No. 80-1570

APR 14 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH W. SMITH, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of the decision below in this income tax case upholding a deficiency of $640.96 in 1974 and a negligence penalty of $61.91 for 1973 (Pet. App. 3, 4; R. 169, 170)[1] on the grounds that: (1) the income tax and the use of income tax proceeds for social welfare expenditures is confiscation of property in violation of the due process clause of the Fifth Amendment; and (2) the Internal Revenue Service and various of its employees conspired to defraud and harass him by, *inter alia*, crediting a 1975 refund against his 1973 and 1974 tax liabilities (Pet. 46-47), and making erroneous assessments.

The pertinent facts may be summarized as follows: In a joint return filed for 1973, petitioner and his wife claimed a

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[1] "R." refers to the original record on appeal as compiled by the Clerk of the Tax Court and filed in the court of appeals.

credit of $1,238, or 20% of their tax liability, as a "constitutional protest of the taxing and spending policies" of the government (R. 109-110). On audit, the Commissioner disallowed this credit (R. 89) and asserted a negligence penalty under Section 6653(a) of the Internal Revenue Code (26 U.S.C.) for taking a groundless credit (R. 153). Subsequently, the Commissioner allowed a net operating loss carryback from 1976 to 1973 in the amount of $1,695.40, resulting in an overpayment for 1973, which is now being held in petitioner's account pending the outcome of this case (R. 94).

In 1974, petitioner filed what purported to be a joint income tax return, but which his wife did not sign (R. 89-90). Petitioner's wife later filed a separate return (R. 90). The Internal Revenue Service originally treated petitioner's return as a joint return. This error was corrected and ultimately petitioner was treated as a married individual filing a separate return (R. 24, 90).

On his 1974 return, petitioner claimed a $200 deduction for "food stamp swindle" and a $429 credit against taxes as a protest of taxing and spending policies. He also reduced the reported gain on the sale of land by the "Joseph W. Smith, Jr. Way" (R. 90, 91, 92, 113-114), for asserted depreciation in the value of currency (R. 115). The Commissioner disallowed these claims and made numerous adjustments to reflect the splitting of income and deductions between the separate returns filed by petitioner and his wife[2] (R. 90-93). When petitioner challenged the Commissioner's action in the Tax Court, petitioner did not dispute the computation of the tax, but advanced constitutional objections to the income tax (R. 143-148).[3]

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[2]During 1974, petitioner and his wife were residents of Texas, a community property state (R. 113).

[3]While this case was pending in the Tax Court, petitioner brought suit in the United States District Court for the Southern District of Florida

ARGUMENT

1. There is no basis for petitioner's claim (Pet. 22-23) that the income tax is an unconstitutional confiscation of property without due process of law. Every court that has considered this argument has rejected it. See, *e.g.*, *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916); *Swallow* v. *United States*, 325 F. 2d 97, 98 (10th Cir. 1963), cert. denied, 377 U.S. 951 (1964); *Acker* v. *Commissioner*, 258 F. 2d 568, 575 (6th Cir. 1958), aff'd on other issues, 361 U.S. 87 (1959); *United States* v. *Keig*, 334 F. 2d 823, 826 (7th Cir. 1964). See also *Wood* v. *Commissioner*, 462 F. 2d 691, 694 (5th Cir. 1972). It is likewise clear that petitioner's objections (Pet. 17) to the use of funds generated by the income tax for various social welfare purposes are "exclusively within the jurisdiction of the legislative and executive branches," rather than the courts. *Swallow* v. *United States*, *supra*, 325 F. 2d at 98.

2. Petitioner's charges of fraud (Pet. 7, 42, 45-47) and harassment (Pet. 41, 46) by the Internal Revenue Service are similarly without merit. The charges are based on an error made by the Service in determining petitioner's 1974 income tax liability. In computing the self-employment tax owed for 1974, the Service erroneously failed to take into account a loss reported by petitioner, resulting in an overassessment of $136.19 (R. 99). This error was regrettable, but as the court of appeals found (Pet. App. 33), it was corrected prior to trial and did not cause petitioner any injury.[4]

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for a refund of taxes paid for 1975. See *Smith* v. *Director of Internal Revenue*, 40 A.F.T.R. 2d 5553 (S.D. Fla. 1977). The Commissioner had credited petitioner's 1975 refund against the tax liabilities for 1973 and 1974 pursuant to Section 6402(a) of the Code. The district court dismissed petitioner's suit and petitioner did not appeal that action.

[4]Petitioner was also presented with an erroneous assessment of taxes due to his claim of a $429 credit against tax as a protest for government taxing and spending policies. This assessment was made under the

Petitioner's second claim of fraud (Pet. 11-12, 42) is based on the credit of a 1975 tax refund against his 1974 tax liability. But this issue is barred by *res judicata* (see Pet. App. 33-34), because petitioner made the same claim in the district court. *Smith* v. *Director of Internal Revenue*, 40 A.F.T.R. 2d 5553 (S.D. Fla. 1977). See note 3, *supra*. Petitioner took no appeal when the district court dismissed his suit for refund. Thus, since petitioner allowed that decision to become final, he cannot be heard to argue here (Pet. 49) that the district court erroneously dismissed his refund suit.

Petitioner also charges harassment by the Internal Revenue Service, through its "microscopic examination of his 1973 records" (Pet. 49), and "inappropriate meddling" (Pet. 53) by allowing his wife to file a separate return for 1974. It is, however, well settled that the Internal Revenue Service "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Powell*, 379 U.S. 48, 57 (1964). Moreover, the agents' contacts with petitioner and his wife were nothing more than the investigation and audit of returns. See *Granger* v. *Marek*, 583 F. 2d 781, 784-785 (6th Cir. 1978). The audit of petitioner's wife's return was entirely proper because she was a party to the 1973 joint return and had possession of all the records (see Pet. App. 40). Furthermore, there is no evidence to support petitioner's contention (Pet. 51-53) that his wife was coerced into filing separately in 1974. Under Section 6013(a) of the Code, petitioner's wife was not required to file a joint return, and the evidence shows (Exh. 4-D) that she wished to dissociate herself from petitioner's tax protests.

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mathematical error provision, and would have denied the Tax Court jurisdiction over petitioner's constitutional claims (Section 6213(b)(1) of the Code. The government abated the assessment prior to trial (R. 99) in order to allow petitioner to argue the merits of his claim in the Tax Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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